SUPREME COURT, U. S.

AUG 16 1970

J. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 555

PAUL BENNETT BIGMAN,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INDEX

PAGE

Citations to Opinions Below 1

Jurisdiction 2

Questions Presented for Review 2

Statutes and Regulations Involved 3

Statement of the Case 4

Reasons for Granting the Writ 6

POINT I

The Government should be required to comply with regulations designed to avoid prosecution for failure to register 7

1. Failure to Implement Involuntary Registration 7

2. Failure to Explain Penalty and Provide Opportunity for Reconsideration 10

POINT II

The due process clause of the Fifth Amendment requires that petitioner receive equal protection in his conscientious objection to participation in the ritual of registering for the draft 12

PAGE

POINT III

The free exercise clause of the First Amendment protects the religiously compelled refusal of petitioner to voluntarily participate in the registration process, since the purpose of registration can be accomplished in a manner which does not conflict with his conscience 15

POINT IV

Petitioner's conviction should be reversed because of the admission of statements by the defendant in violation of the explicit requirements of *Miranda* 18

CONCLUSION 23

APPENDIX:

Opinion of the United States Court of Appeals, Ninth Circuit PA-1

Statutes and Regulations PA-4

Selective Service System Form No. 392 ..... PA-8

Letter of Major Thomas R. Maher Dated June 24, 1970 ..... PA-12

Opinion of the Court in *United States* v. *Lindsay* PA-14

Selective Service System Form No. 304 ..... PA-26

Table of Authorities

PAGE

Cases:

Bolling v. Sharpe, 347 U.S. 497 (1954) 13
Breen v. Selective Service Local Board No. 16, —— U.S. ——, 2 SSLR 3373 (Jan. 26, 1970) 11, 22

Cannon v. United States, 181 F.2d 354 (1950) 15
Chernekoff v. United States, 219 F.2d 721 (9th Cir. 1955). 11

Estep v. United States, 327 U.S. 114 (1946) 9
Everson v. Board of Education, 330 U.S. 1 (1947) 13

Goguen v. Clifford, 304 F. Supp. 958 (D. N.J. 1969) 13
Gutknecht v. United States, —— U.S. ——, 2 SSLR 3367 (Jan. 19, 1970) 11, 22

Hamilton v. Board of Regents, 293 U.S. 245 (1934) 12

Jenison, In re, 265 Minn. 96, 120 N.W. 2d 515 (1963), vacated and remanded 375 U.S. 14 (1963), on remand 125 N.W. 2d 588 (1963) 17

Koster v. Sharp, 303 F. Supp. 837 (E.D. Pa. 1969) 13

Miller v. United States, 388 F.2d 973 (9th Cir. 1967) 7
Miranda v. Arizona, 384 U.S. 436 (1966) 3, 18, 19, 20, 21, 22, 23
Murray v. Blatchford, 307 F. Supp. 1038 (D.R.I. 1969) 7

Negre v. Larsen, 418 F.2d 908 (9th Cir. 1969), *cert. granted*, —— U.S. ——, 38 USLW 3517 (1970) 14

PAGE

Pittman v. United States, 411 F.2d 635 (10th Cir. 1969) 23
Proctor v. United States, 404 F.2d 819 (D.C. Cir. 1968) 21

Quinn v. United States, 349 U.S. 155 (1955) 12

Richter v. United States, 181 F.2d 591 (9th Cir. 1950) 9
Rickey v. United States, 360 F.2d 32 (9th Cir. 1966) 20

Selinger v. Bigler, 377 F.2d 542 (9th Cir. 1967) 20
Service v. Dulles, 354 U.S. 363 (1957) 7
Sherbert v. Verner, 374 U.S. 398 (1963) 17
Simon v. United States, No. 24,758 (9th Cir. Jan. 26, 1970) 20
Solomon v. United States, 408 F.2d 1306 (D.C. Cir. 1969) 21
Spahr v. United States, 409 F.2d 1303 (9th Cir. 1969) 20
Stoppleman v. United States, 406 F.2d 127 (1st Cir. 1969) 11

Torcaso v. Watkins, 367 U.S. 488 (1961) 13
Toussie v. United States, —— U.S. ——, 2 SSLR 3451 (Mar. 2, 1970) 9

Townsend v. Zimmerman, 237 F.2d 376 (6th Cir. 1956) 7

United States v. Baker, 1 SSLR 3017 (E.D.N.Y. 1968) 23
United States v. Bowen, —— F. Supp. ——, 2 SSLR 3421 (N.D. Cal. Dec. 24, 1969) 13
United States v. Casias, —— F. Supp. ——, 2 SSLR 3407 (D. Colo. Dec. 3, 1969) 19, 20, 23

PAGE

United States ex rel. O'Connor v. State of New Jersey, 405 F.2d 632, *cert. denied* 395 U.S. 923 (1969) 21
United States ex rel. Shiffman v. Commanding Officer, United States v. Dickerson, 413 F.2d 1111 (7th Cir. 1969) 20
United States v. Gillette, —— F.2d ——, 2 SSLR 3474 (2d Cir. Jan. 9, 1970), *cert. granted*, —— U.S. ——, 38 USLW 3517 (1970) 13-14
United States v. Gower, 271 F. Supp. 655 (M.D. Pa. 1967) 20
United States v. Habig, No. IP 66 CR 138 (S.D. Ind. Nov. 19, 1968) 20
United States v. Holmes, 387 F.2d 781 (7th Cir. 1967) 23
United States v. Kelly, —— F. Supp. —— (E.D.N.Y., May 27, 1970) (#70-C-567) 22
United States v. Kingery, 67-1 U.S. Tax Cas. ¶9262 (N.D. Fla. 1967) 20
United States v. Lackey, Lafayette Criminal No. 157 (N.D. Ind. Oct. 2, 1968) 20
United States v. Lindsay, No. 3496-ND (S.D. Cal. Jan. 17, 1958) 11
United States v. McFadden, 309 F. Supp. 502 (N.D. Cal. Feb. 20, 1970) 13
United States v. Medina Orta, 305 F. Supp. 1073 (D. P.R. 1969) 11, 12
United States v. Mock, 1 SSLR 3359, 262 CR 67 (D.
United States v. Norton, 179 F.2d 527 (2d Cir. 1950) 8, 9, 11
N.J. September 20, 1968) 8
United States v. Palmer, 223 F.2d 893 (3rd Cir. 1955) 14
United States v. Prescott, 301 F. Supp. 1116 (D.N.H. 1969) 7

PAGE

United States v. Schoenberg, 67-1 U.S. Tax Cas. ¶9393 (D. Ariz. 1966) 20
United States v. Seeger, 380 U.S. 163 (1965) 13, 16
United States v. Sisson, 297 F. Supp. 902 (D. Mass. 1969), app. dism. —— U.S. ——, 38 USLW 4616 (June 29, 1970) 12-13, 15, 16
301 F. Supp. 1363 (S.D.N.Y. 1969) 12
United States v. Townsend, No. IP 65 CR 115 (S.D. Ind. Sept. 14, 1966) 20
United States v. Turzynski, 268 F. Supp. 847 (N.D. Ill. 1967) 20
United States v. Universal C.I.T. Credit Corporation, 344 U.S. 218 (1952) 9
United States v. Wade, 388 U.S. 218 (1967) 22
United States v. Wainwright, 284 F. Supp. 129 (D. Colo. 1968) 20
United States v. Walsh, 279 F. Supp. 115 (D. Mass. 1968) 7
United States v. Welsh, —— U.S. ——, 38 USLW 4486, 3 SSLR 3001 (June 15, 1970) 13
Vitarelli v. Seaton, 359 U.S. 535 (1959) 7
Williams v. Illinois, —— U.S. ——, 38 USLW 4607 (June 29, 1970) 15, 17
Wolff v. Selective Service Local Board No. 16, 372 F.2d 817 (2d Cir. 1967) 7
Yates v. United States, 354 U.S. 298 (1956) 17

Constitutional Provisions:

United States Constitution

First Amendment 3, 15, 16, 17
Fifth Amendment 3, 12

PAGE

Statutes:

28 U.S.C. 1254(1) 2

Military Selective Service Act of 1967

50 U.S.C. App., §453 3

§456(j) 3

Regulations:

Selective Service Regulations

32 C.F.R. 1606.51(a) 2, 10

1613.11 ..... 2, 3, 8

1613.13(c) 2, 3, 8

1613.16 ..... 2, 4, 10, 11, 12

Rule:

Rule 52(b) of the Federal Rules of Criminal Procedure 18, 21

Other Authorities:

"A Postscript to the Miranda Project: Interrogation of Draft Protesters," 77 YALE LAW J. 300 (1967) 23

McKay, "The Preference for Freedom," 34 N.Y.U.L. REV. 1182 (1959) 17

Stone, "The Conscientious Objector," 21 COL. U. Q. 253 (1919) 16

In the

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No. .....

Paul Bennett Bigman,

Petitioner,

—v.—

United States of America,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled action on June 29, 1970.

Citations to Opinions Below

The opinion of the United States Court of Appeals for the Ninth Circuit, filed June 29, 1970, is not yet reported and is printed in the appendix hereto (PA-1 through PA-3). There was no opinion by the United States District Court for the District of Oregon.

Jurisdiction

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on June 29, 1970. On July 28, 1970, Mr. Justice Brennan signed an order extending petitioner's time to file this petition up to and including August 17, 1970. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

Questions Presented for Review

1. Whether the government is legally obligated to comply with those Selective Service regulations (32 C.F.R. 1613.11 and 1613.13(c)) which provide that the registrar of the Local Board who has all the necessary information for completion of the registration card must perform involuntary registration of anyone who refuses to participate in the registration process.

2. Whether the government is legally obligated to comply with the Selective Service regulation (32 C.F.R. 1613.16), which requires that the Selective Service System advise a non-registrant of the penalties provided by law for refusal to register, and give him a last clear chance to reconsider.

3. Whether the government is legally obligated to use the form prescribed by the Director of Selective Service, and therefore prescribed by the Regulations (32 C.F.R. 1606.51(a)), to notify a non-registrant of his duty to register with the Selective Service System.

4. Whether equal protection of the law under the Fifth Amendment requires that the government respect the right of a conscientious objector whose conscience forbids participation in war in any form, including participation in the process of registration, to refuse to voluntarily register for the draft.

5. Whether the guaranty of religious liberty in the free exercise clause of the First Amendment protects petitioner's conscientious objection to voluntary participation in the ritualistic exercise of registration, where involuntary registration provides a reasonable alternative to prosecution for refusal to register.

6. Whether it was a violation of petitioner's constitutional rights to permit testimony of an admission made by the petitioner to an FBI agent prior to receiving any *Miranda* warnings while the agent was interrogating petitioner at petitioner's home; and whether an appellate court may take notice of such error where there was objection to such testimony but not specifically on the *Miranda* grounds, and where petitioner later testified to some of the facts admitted in evidence.

Statutes and Regulations Involved

This case involves the due process clause of the Fifth Amendment and the free exercise clause of the First Amendment to the United States Constitution.

Also involved are certain sections of the Military Selective Service Act of 1967, Title 50 U.S.C. App., §453 and 456(j). Likewise involved are §1613.11, 1613.13(e) and

1613.16 of the Selective Service Regulations, Title 32 C.F.R.[1]

Statement of the Case

Petitioner, Paul Bennett Bigman, born August 24, 1950, and raised as a Unitarian (R 45), is a conscientious objector with a "deep-seated revulsion for mass killing, mass death . . ." (R 44).[2] Because of his conscientious beliefs, he is compelled to regard the Selective Service System as "essentially a mechanism for perpetuating mass killing . . ." (R 44). He cannot in good conscience participate in war in any form, even to the extent of registering with the Selective Service System (R 46).

On May 13, 1969, James R. Echols and Richard G. Knudson, special agents of the Federal Bureau of Investigation, went to the home of Paul Bennett Bigman to make inquiry concerning his possible non-registration with the Selective Service System (R 16). Agent Echols had seen Bigman's name on written protests against the draft, and preliminary criminal investigation was done prior to the visit (R 21).

The agents went to the door, knocked and identified themselves. Agent Echols told Bigman that he was there to make inquiry concerning Bigman's possible non-registration with the Selective Service System. Bigman invited the agents into his house, and after entering, agent Echols asked Bigman if he was registered with the Selective Service System. Bigman replied that he was not (R 17). At

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[1] The full text of these statutes and regulations is set forth in the appendix hereto.

[2] References are to pages in the record which was before the Court of Appeals. In accordance with Rule 21 of the Rules of this Court, effective July 1, 1970, the record has not been forwarded from the Ninth Circuit.

that point, *after* receiving Bigman's incriminating answer, agent Echols advised Bigman of his constitutional rights (R 18). Bigman was then asked if he was aware that he was in violation of federal law, and answered that he was aware that some people considered this to be a violation of the law. When asked if he was willing to register with the Selective Service, Bigman answered "emphatically no." The FBI agents then terminated the interview (R 18-19).

Agent Echols testified at the trial that following this interview he did not go to the Selective Service Local Board and register Bigman (R 28).

Deputy United States Marshal Kernan H. Bagley testified that three days later on May 16, 1969, following Bigman's arrest for failure to register, Bigman was brought into Bagley's office in Portland, Oregon (R 32). Although Mr. Bagley did not testify that he gave defendant Bigman any warnings concerning his constitutional rights, Mr. Bagley testified that he did ask Bigman several questions. In response Bigman told Mr. Bagley his birth date, his place of birth, and his present residence (R 33). Mr. Bagley testified that after he obtained this information he did not cause Mr. Bigman to be registered with the Selective Service System (R 34).

No evidence was offered at trial to show that any person connected with the Selective Service System made any effort to utilize the information obtained about Bigman to register him.

There was no testimony at the trial that Bigman refused to provide any information necessary for the registration process. The record is clear that he courteously and cooperatively answered each and every question which was put to him.

There was no evidence offered at the trial to show that Selective Service System Form No. 392, the special form prescribed by the Director of Selective Service for notifying non-registrants of their duty to register, was ever sent to petitioner.

Nor was there evidence that agents Echols or Knudson, Deputy Marshal Bagley, Major Formick (of Oregon State Headquarters of the Selective Service System), or any member of Bigman's Local Board made an effort to persuade Bigman to change his position or informed Bigman of the penalties for failure to register.

Reasons for Granting the Writ

Certiorari should be granted because the Court of Appeals has decided several important questions of Selective Service law and Federal criminal law which have not been, but should be, settled by this Court. Certiorari should also be granted because some of the issues decided by the Court of Appeals are in conflict with decisions of other courts of appeals.

POINT I

The Government should be required to comply with regulations designed to avoid prosecution for failure to register.

In its haste to prosecute petitioner for failure to register, the Government ignored several regulations designed to minimize the necessity for prosecution of nonregistrants. By affirming the conviction, the court below exacerbated an inter-circuit conflict which can only be resolved by this Court. This Court should grant certiorari and instruct the Selective Service System that where it may accomplish its purpose without prosecution, through compliance with its own regulations, it must do so.[3]

1. *Failure to Implement Involuntary Registration.*

The law does not require that every nonregistrant must be declared a felon, regardless of whether the failure to register is open or concealed, or grounded on conscience or evasiveness. Liberal regulations providing for third-party or involuntary registration evidence a policy of avoiding such a Draconian result. Registration officials are expressly directed to fill out the registration card on the basis

[3] The Government, of course, has the same duty as the citizen to comply with its administrative regulations. *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959); *Service* v. *Dulles*, 354 U.S. 363 (1957), including Selective Service Regulations; *Miller* v. *United States*, 388 F.2d 973 (9th Cir. 1967); *Townsend* v. *Zimmerman*, 237 F.2d 376 (6th Cir. 1956); *Wolff* v. *Selective Service Local Board No. 16*, 372 F.2d 817 (2d Cir. 1967); *Murray* v. *Blatchford*, 307 F. Supp. 1038 (D.R.I. 1969); *United States* v. *Walsh*, 279 F. Supp. 115 (D. Mass. 1968); *United States* v. *Prescott*, 301 F. Supp. 1116 (D. N.H. 1969).

of information obtained from the registrant "and by observation of the registrant," 32 C.F.R. §1613.11. Refusal by the registrant to sign his name to the registration card has only one legal consequence. It imposes upon the Registrar the duty of signing the registrant's name, thereby completing the registration process. 32 C.F.R. §1613.13(c).

The Government had more than sufficient information with which to register petitioner. The investigation conducted by the Government provided the name, address, age, physical description, and all other basic information needed to complete the process of registration. Petitioner willingly supplied all of this information to the investigators, and did not refuse to answer any questions.

It is the law of the Second Circuit that where a draft board has acquired sufficient information to fill out the registration card, it must carry out involuntary registration rather than prosecute. *United States* v. *Norton,* 179 F.2d 527 (2d Cir. 1950). See, also, *United States* v. *Mock,* 1 SSLR 3359, 262 CR 67 (D.N.J. September 20, 1968) (not officially reported). In *Norton,* the Court held that the only punishable conduct was "refusal to cooperate, evasion, refusal to answer, or answering falsely." 179 F.2d at 529. Judge Swan explained:

> "If the substantive duty of furnishing all requested information is performed by a registrant, we think he does 'submit to registration' and that the statute and regulations do not clearly make criminal a refusal to perform the purely ministerial duty of signing." *Ibid.*

Where a local board has all of the information it needs to effect registration, the only act which would require physi-

cal presence at the local board is the act of signing the registration card, an act which the Second Circuit in *Norton* has found unnecessary.

The Court below, citing its own prior decision in *Richter* v. *United States*, 181 F.2d 591, 594 (9th Cir. 1950), disagrees with the Second Circuit and requires physical presence at the Board and total cooperation with the registration process.[4]

This Court should grant certiorari to settle the conflict, and the *Norton* rule should be adopted. The *Norton* rule is sounder because of the desirability of choosing a milder over a harsher alternative,[5] and because it is more in keeping with the Congressional purpose of preferring mobilization to litigation.[6]

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[4] The decision below implies that *Richter* and this case are distinguishable from *Norton*, in that Norton "presented himself at the office of the local board . . . and talked courteously with the chairman." 179 F.2d at 529. But the essence of the *Norton* holding was that Norton was not guilty because the Government "offered no proof that he refused to give all information necessary for the registrar to make the required entries on the registration card." 179 F.2d at 529. And in *Richter*, decided three months after *Norton*, although it does not appear that the registrant furnished all of the requisite information, the essence of the holding is that nothing less than complete obeissance will satisfy the registration requirement.

[5] Cf. *Toussie* v. *United States*, —— U.S. ——, 2 SSLR 3451, 3453 (March 2, 1970), quoting *United States* v. *Universal C.I.T. Credit Corporation*, 344 U.S. 218, 221-222 (1952):

> ". . . when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication."

[6] *Cf.* Mr. Justice Frankfurter in *Estep* v. *United States*, 327 U.S. 114, 140 (1946) (concurring opinion).

2. *Failure to Explain Penalty and Provide Opportunity for Reconsideration.*

Petitioner's local board violated Section 1613.16 of the regulations which states:

> "Recalcitrants.—*If a registrant refuses to cooperate* or is inclined to evade, refuses to answer, or answers falsely, his attention should be called to the penal provisions of the Military Selective Service Act of 1967. If he is still refractory, witnesses should be called and, after the penalty of the law has been explained again to him in the presence and hearing of witnesses, *a full opportunity should be given him to reconsider his actions and answer the questions.* If he is still refractory, his name and the names of the witnesses should be noted and the case immediately reported to the United States district attorney. The registration should not be obstructed or delayed. Persons attempting to obstruct or delay it should be dealt with promptly and firmly." 32 C.F.R. §1613.16. (Emphasis added.)

The regulation is further evidence of a policy to avoid prosecution, and to seek every means of effecting registration—a policy which was not followed in this case.

Warning of the penalties could have been given by Agent Echols, by Deputy Marshal Bagley, or by any echelon of the Selective Service System. Warning could be sent along with SSS Form No. 392,[7] or by personal letter.[8]

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[7] Form No. 392 (PA-8) is especially designed and provided for alerting and notifying suspected nonregistrants of their duty to register. As an official Selective Service Form, it is a part of the Selective Service Regulations, 32 C.F.R. & 1606.51(a), and failure

The Court below, without any precedent to follow,[9] interpreted §1613.16 as requiring the presence of the nonregistrant at the local board before warning need be given. But the regulation sets forth no such requirement and should be interpreted in the light of the broader policy of obtaining compliance from all known nonregistrants rather than hastily prosecuting technical violators.

The duty to warn of penalties has been enforced in other Selective Service situations. For example, failure to warn of the penalties for induction refusal is grounds for acquittal. *Chernekoff* v. *United States*, 219 F.2d 721, 725 (9th Cir. 1955); *United States* v. *Lindsay*, No. 3496-ND (S.D. Cal. January 17, 1958) (unreported; see opinion at PA-14). An opportunity to reconsider, a last clear chance, is essential to the policy of encouraging registration. "Some thoughtful probing of appellant's views might either have caused appellant to change them or to change his intended course of conduct. . . ." *Stoppleman* v. *United States*, 406 F.2d 127, 130 (1st Cir. 1969).[10]

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to send a form is a regulatory violation. See *United States* v. *Medina Orta*, 305 F. Supp. 1073 (D. P.R. 1969). Yet such form was never sent to Petitioner.

[8] In New York City, the System often sends a personal letter to nonregistrants who indicate possible compliance with the registration requirements. Annexed hereto at PA-12 of the Appendix is a letter dated June 24, 1970, from Maj. Thomas R. Maher, of New York City Headquarters of Selective Service, attesting to the fact that such letters are sent to nonregistrants.

[9] The only other case found by counsel which contains any discussion at all of §1613.16 is *Norton*. See 179 F.2d 527, 529.

[10] Before the delinquency regulations were declared unconstitutional, *Breen* v. *Selective Service Local Board No. 16*, —— U.S. ——, 2 SSLR 3373 (January 26, 1970); *Gutknecht* v. *United States*, —— U.S. ——, 2 SSLR 3367 (January 19, 1970), the Selective Service System was required to give delinquents ad-

This Court has held that a recalcitrant witness before a Congressional committee must be given specific notice and opportunity to reconsider before his refusal to answer a question amounts to a crime. See *Quinn* v. *United States*, 349 U.S. 155, 165-170 (1955). ("[P]etitioner was never confronted with a clear-cut choice between compliance and noncompliance . . . ." 349 U.S. at 166.) This Court should grant certiorari and rule that Section 1613.16 lays down a similar doctrine of last clear chance for the protection of an eighteen-year old who is facing the traumatic first moment of military conscription.

POINT II

The due process clause of the Fifth Amendment requires that petitioner receive equal protection in his conscientious objection to participation in the ritual of registering for the draft.

Religious beliefs on war vary. There are conscientious objectors to combatant training and service, conscientious objectors to any military training and service, and conscientious objectors to registration for conscription. But the law recognizes the first two, and ignores the last. Regardless of whether there is a constitutional right of conscientious objection in the absence of statute, compare *Hamilton* v. *Board of Regents*, 293 U.S. 245 (1934), with *United States* v. *Sisson*, 297 F. Supp. 902 (D. Mass. 1969), appeal

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vance notice of delinquency and an opportunity to reconsider and cure such delinquency. *United States ex rel. Shiffman* v. *Commanding Officer*, 301 F. Supp. 1363 (S.D.N.Y. 1969). Failure to send the delinquent the form of Delinquency Notice (see PA 26), which contained warning of the penalties, was grounds for acquittal. *United States* v. *Medina Orta*, 305 F. Supp. 1073 (D. P.R. 1969).

dismissed —— U.S. ——, 38 USLW 4616 (June 29, 1970), once Congress recognizes conscientious objection, it may not arbitrarily cut off a particular class of objectors. Failure to recognize the religious belief of the conscientious objector to registration, in the context of statutory recognition of the religious beliefs of other classes of conscientious objectors is a violation of the equal protection doctrine embedded in the due process clause. See *Bolling* v. *Sharpe*, 347 U.S. 497 (1954); *Torcaso* v. *Watkins*, 367 U.S. 488, 495 (1961); *Everson* v. *Board of Education*, 330 U.S. 1 (1947).

If the equal protection doctrine requires recognition of differing religious grounds for conscientious objection, see concurring opinion of Mr. Justice Douglas in *United States* v. *Seeger*, 380 U.S. 163, 188 (1965); and if it forbids discrimination in favor of religious beliefs and against equally sincere moral or ethical beliefs, see concurring opinion of Mr. Justice Harlan in *United States* v. *Welsh*, —— U.S. ——, 38 USLW 4486, 4489, 3 SSLR 3001, 3003 (June 15, 1970);[11] and if equal protection extends to those whose conscientious objection is confined to a particular war, *United States* v. *Bowen*, —— F. Supp. ——, 2 SSLR 3421 (N.D. Cal. December 24, 1969); *United States* v. *McFadden*, 309 F. Supp. 502 (N.D. Cal. February 20, 1970); *United States* v. *Sisson*, 297 F. Supp. 902 (D. Mass. 1969), app. dismissed —— U.S. ——, 38 USLW 4616 (June 29, 1970);[12]

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[11] In *Goguen* v. *Clifford*, 304 F. Supp. 958, 962 (D. N.J. 1969) and *Koster* v. *Sharp*, 303 F. Supp. 837, 845 (E.D. Pa. 1969), it was held that a statute which allows conscientious objector status to religious objectors but denies it to non-religious objectors, was likewise a violation of the equal protection clause. "The Constitution and its Amendments never provided for such discriminatory legislation by Congress." *Goguen, supra.*

[12] This Court has recently granted certiorari on this question in *United States* v. *Gillette*, —— F.2d ——, 2 SSLR 3474 (2d Cir.

then equal protection should be granted to conscientious objectors whose beliefs prohibit voluntary submission to registration.

Judge Maris, speaking for three dissenters, stated in *United States* v. *Palmer*, 223 F.2d 893, 898 (3rd Cir. 1955):

> "I find nothing in the act or regulations to support the conclusion that a conscientious objector should be refused the appropriate classification and placed in Class I-A merely because his conscientious scruples against participation in war extend to participation in the preparatory procedure as well. To hold otherwise would be to impute to the Congress which has fully recognized the position of conscientious objectors and provided exemption for them as a class an intention to withhold that exemption from and to brand as felons those members of the class which have *the most sensitive consciences* of all the group. This I certainly cannot do." (223 F.2d at 898.) (Emphasis added.)

The Court below characterized this argument as a question of discrimination "between registered and nonregistered conscientious objectors" (PA-3). But such an oversimplification avoids the real question. The discrimination is between two classes of religious believers, those whose conscientious objection does not extend to voluntary submission to the registration process and those whose conscientious objection does.

January 9, 1970), *cert. granted*, —— U.S. ——, 38 USLW 3517 (1970); *Negre* v. *Larsen*, 418 F.2d 908 (9th Cir. 1969), *cert. granted*, —— U.S. ——, 38 USLW 3517 (1970).

Particularly, since there are constitutionally acceptable alternatives to accomplish the purpose of registration, such as involuntary registration, see Point I, *supra*, this Court should grant certiorari and settle the long-troubling question[13] of whether the sincere religious objector to participation in the registration process has any constitutional protection. ". . . [T]he constitutional imperatives of the Equal Protection Clause must have priority over the comfortable convenience of the status quo." *Williams* v. *Illinois*, —— U.S. ——, 38 USLW 4607, 4610 (June 29, 1970).

POINT III

The free exercise clause of the First Amendment protects the religiously compelled refusal of petitioner to voluntarily participate in the registration process, since the purpose of registration can be accomplished in a manner which does not conflict with his conscience.

Chief Judge Wyzanski wrote in *United States* v. *Sisson*, 297 F. Supp. 902 (D. Mass. 1969) at 910-911:

> "When the state through its laws seeks to override reasonable moral commitments it makes a dangerously uncharacteristic choice. The law grows from the deposits of morality. Law and morality are, in turn, debtors and creditors of each other. The law cannot be adequately enforced by the courts alone, or by courts supported merely by the police and the military. The true secret of legal might lies in the habits of con-

[13] The Ninth Circuit has, in another case, expressed its concern that there should be some way "of relieving young conscientious zealots from the overwhelming burden of carrying the felon's brand . . . ." *Cannon* v. *United States*, 181 F.2d 354, 356 (1950).

> scientious men disciplining themselves to obey the law they respect without the necessity of judicial and administrative orders. When the law treats a reasonable, conscientious act as a crime it subverts its own power. It invites civil disobedience. It impairs the very habits which nourish and preserve the law."

Chief Justice Stone warned with regard to the conscience of one opposed to war: ". . . nothing short of the self-preservation of the state should warrant its violation." Stone, "The Conscientious Objector," 21 Col. Univ. Q. 253, 269 (1919).[14]

The Government's claim to registration of conscientious objectors is not of "comparable magnitude" to the claim of the individual for the integrity of his conscience. This is particularly true at the current time. As the Court pointed out in *United States* v. *Sisson, supra:*

> "It is equally plain that when a nation is fighting for its very existence there are public interests of great magnitude in conscripting for the common defense all available resources, including manpower for combat.
>
> "But a campaign fought with limited forces for limited objects with no likelihood of a battlefront within this country and without a declaration of war is not a claim of comparable magnitude." 297 F. Supp. at 908-909.

The state may not violate the conscience as long as there are alternatives which would satisfy governmental needs without infringing First Amendment rights. The possible

[14] Cited by this Court in *United States* v. *Seeger,* 380 U.S. 163, 170 (1965).

abuses of the obligation to register should be weighed against the fact that the Government must ". . . demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights." *Sherbert* v. *Verner*, 374 U.S. 398, 407 (1963). See particularly *In re Jenison*, 265 Minn. 96, 120 N.W. 2d 515 (1963), vacated and remanded 375 U.S. 14 (1963), on remand 125 N.W. 2d 588 (1963), where this principle was applied to grant constitutional relief to a religious objector to compulsory jury duty. Involuntary registration is an example of such an alternative; see Point I, *supra;* there are many others.[15]

Legislation which is in derogation of a First Amendment freedom should be strictly construed, particularly where a criminal statute is involved. *Yates* v. *United States*, 354 U.S. 298 (1956); McKay, "The Preference for Freedom," 34 N.Y.U.L. Rev. 1182, 1214-1215 (1959). Prosecution for refusal by a conscientious objector to register should be carried out only if there is no other conceivable way in which the Selective Service System can accomplish its ends without violating the conscientious principles of the individual. See *In re Jenison, supra.*

This Court should grant certiorari and rule on whether the availability of constitutionally permissible and functionally feasible alternatives provides any relief for petitioner's First Amendment claim of religious liberty.

---

[15] Government has wide discretion in finding a consfitutionally permissible alternative. See *Williams* v. *Illinois*, —— U.S. ——, 38 USLW 4607 (June 29, 1970). One obvious alternative is to allow as a defense to a prosecution for failure to register, a demonstration that the defendant is a conscientious objector to participation in the registration process. Should this Court reverse the conviction, and order a new trial, the remand order could contain such an instruction.

POINT IV

Petitioner's conviction should be reversed because of the admission of statements by the defendant in violation of the explicit requirements of *Miranda*.

This Court should also grant certiorari to review several important issues regarding the *Miranda* warnings as to which there is a sharp conflict among the circuits. The main issue here is whether FBI agents interrogating a suspected non-registrant must give the *Miranda* warnings before asking any incriminating questions. This Court should review the conflict among the circuits as to whether a defendant must be "in custody" in order to be entitled to the *Miranda* warnings. And this Court should consider the question, as to which there appears to be a conflict among the circuits, whether the admission of testimony in violation of *Miranda* is a plain error affecting substantial rights under Rule 52(b) of the Federal Rules of Criminal Procedure.

The key Government witness at the trial of petitioner was FBI Agent Echols who had interrogated petitioner and obtained the most important piece of evidence *prior* to informing petitioner of his constitutional rights. The following is Agent Echols' testimony:

> "Q. After entering the house, did you say anything to Mr. Bigman? A. I asked Mr. Bigman if he was registered with the Selective Service System.
>
> "Q. And what, if anything, did he say to you? A. He replied that he was not.
>
> "Q. At that point, Agent Echols, did you advise Mr. Bigman that he was entitled to certain constitutional rights? A. I did.

"Q. Would you tell the Court and jury specifically what you advised Mr. Bigman. A. I advised Mr. Bigman that he was entitled to remain silent. . . . " (R 17-18).

In this way Agent Echols learned, prior to any *Miranda* warnings, that petitioner was not registered. Counsel moved to strike Agent Echols' testimony, but did not specifically state *Miranda* as the grounds for such motion (R 35).[16]

The admission, made by defendant prior to being informed of his rights, was an "essential link in the course of forging a chain" of evidence leading to his conviction. *United States* v. *Casias*, —— F. Supp. ——, 2 SSLR 3407 (D. Colo. December 3, 1969). *Casias* was a Selective Service case in which defendant had been requested to appear at his local board so that it could determine whether he had received the proper notice of classification. Such evidence was necessary before the board could forward the defendant's case for prosecution. The Court held that defendant was entitled to the *Miranda* warnings upon arrival at the board because he was the subject of an investigation intended to lead to his prosecution.

[16] Further incriminating admissions were obtained from petitioner by Deputy Marshal Bagley, *after petitioner was in custody*. Mr. Bagley did not testify that he gave the defendant any warnings, but stated that in answer to Bagley's questions the defendant told him his date of birth, his place of birth, and his present residence address (R 33). Because the separate and independent interrogation by Deputy Marshal Bagley took place three days after the questioning by FBI Agent Echols, the defendant was entitled to be warned by Deputy Marshal Bagley of his constitutional rights under *Miranda* v. *Arizona*, *supra*. There was no continuity between the two interrogations. The record is silent as to any warnings by Deputy Marshal Bagley, and therefore it must be assumed that he did not give any. *Miranda* v. *Arizona*, 384 U.S. 436, 498-499 (1966).

This Court said in *Miranda* v. *Arizona, supra:*

> "*At the outset,* if a person in custody is to be subjected to interrogation, he must *first* be informed in clear and unequivocal terms that he has a right to remain silent. For those unaware of the privilege, the warning is needed simply to make them aware of it —the *threshold requirement* for an intelligent decision as to its exercise." (Emphasis added.) 384 U.S. at 467-468.

Failure to give the *Miranda* warnings cannot be excused on the theory that petitioner was not "in custody." *United States* v. *Casias, supra.* He was the subject of a criminal investigation in its accusatory stages. *United States* v. *Dickerson,* 413 F.2d 1111 (7th Cir. 1969); *United States* v. *Turzynski,* 268 F. Supp. 847 (N.D. Ill. 1967); *United States* v. *Wainwright,* 284 F. Supp. 129 (D. Colo. 1968); see also *United States* v. *Habig,* No. IP 66 CR 138 (S.D. Ind. Nov. 19, 1968) (unreported); *United States* v. *Lackey,* Lafayette Criminal No. 177 (N.D. Ind. October 2, 1968) (unreported); *United States* v. *Townsend,* No. IP 65 CR 115 (S.D. Ind. September 14, 1966) (unreported); *United States* v. *Gower,* 271 F. Supp. 655, 660 (M.D. Pa. 1967); *United States* v. *Kingery,* 67-1 U.S. Tax Cas. ¶9262 (N.D. Fla. 1967); *United States* v. *Schoenberg,* 67-1 U.S. Tax Cas. ¶9393 (D. Ariz. 1966).

The above decisions are clearly in conflict with decisions of the Ninth Circuit on the question of custody. *Simon* v. *United States,* No. 24,758 (9th Cir. January 26, 1970); *Spahr* v. *United States,* 409 F.2d 1303 (9th Cir. 1969); *Selinger* v. *Bigler,* 377 F.2d 542 (9th Cir. 1967); *Rickey* v. *United States,* 360 F.2d 32 (9th Cir. 1966).

The court below rejected the *Miranda* argument, not on the merits, but on the ground that defendant had not objected to admission of the testimony during the trial. Defendant did object to such testimony, but did not state the grounds for his objection. However, Rule 52(b) of the Federal Rules of Criminal Procedure permits any appellate court, including this Court, in its discretion, to consider this issue for the first time on appeal. Certainly the failure to strike testimony admitted in contravention of *Miranda* is "a defect affecting substantial rights" and it has been held that such defect can be raised on appeal even though no objection was made at the trial. *Proctor* v. *United States,* 404 F.2d 819, 822 (D.C. Cir. 1968). See also *United States ex rel. O'Connor* v. *State of New Jersey,* 405 F.2d 632, *cert. denied* 395 U.S. 923 (1969).

There appears to be a conflict between the *Proctor* decision and the decision of the Ninth Circuit in the case at bar. If admission of testimony in violation of *Miranda* is a "defect affecting substantial rights" as the court indicated in *Proctor,* it would seem that the trial court has an obligation to strike such clearly inadmissible testimony and the appeal court has a corresponding obligation to overrule the trial court's failure to do so.

Surely the failure to request a pre-trial suppression hearing does not constitute waiver of petitioner's rights under *Miranda.* In *Solomon* v. *United States,* 408 F.2d 1306, 1309 (D.C. Cir. 1969), the court held that Rule 52(b) permitted the court to consider for the first time on appeal the propriety of certain testimony concerning identification of the accused. The defendant had failed to request a pre-trial suppression hearing or even to challenge the testimony at trial. Defendant claimed for the first time on appeal that admission of the testimony violated the prin-

ciples set down in *United States* v. *Wade*, 388 U.S. 218 (1967). The District of Columbia Circuit stated that the proper manner of raising a *Wade* objection was by suppression hearing prior to trial, or by objection during trial. The court said it would consider the issue for the first time on appeal, however, because improper identification procedures could constitute "plain errors or defects affecting substantial rights."[17]

This same rationale applies equally to the important issue raised in this case. It is particularly important that the youthful Selective Service violator be provided with all of the protections afforded by the Constitution.[18] Such protection was not provided to petitioner. The question can only be settled by this Court.[19]

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[17] The court below also implied that petitioner waived his *Miranda* warning rights by repeating the substance of the statements made to the FBI agent in his own trial testimony. No decisions are cited in support of this proposition. It is questionable, however, if petitioner would have so testified if the trial court had ruled the agent's testmony constitutionally inadmissible. Cf. *United States* v. *Kelly*, —— F. Supp. —— (E.D.N.Y., May 27, 1970) (#70-C-567), where Judge Zavatt granted a §2255 application, and directed release from confinement notwithstanding a guilty plea to an indictment for induction refusal following a delinquency declaration and punitive reclassification subsequently held unconstitutional by this Court in *Gutknecht* v. *United States*, —— U.S. ——, 2 SSLR 3367 (January 19, 1970), and *Breen* v. *Selective Service Local Board No. 16*, —— U.S. ——, 2 SSLR 3373 (January 26, 1970). If subsequent determination of unconstitutionality supervenes a prior guilty plea and eliminates the possibility of waiver, it would follow, *a fortiori*, that if this Court rules that the agent's testimony was admitted in violation of petitioner's constitutional rights, his subsequent testimony cannot be construed as waiver.

[18] ". . . the importance of the issue to the individuals concerned and the immaturity of many of them in both age and emotional development, requires scrupulous compliance with the procedures embodied in the regulations and applicable statutes designed for

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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*Attorneys for Petitioner**

August, 1970

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their protection." *United States* v. *Baker*, 1 SSLR 3017, 3019 (E.D. N.Y. 1968). See also "A Postscript to the Miranda Project: Interrogation of Draft Protesters" 77 YALE LAW J. 300 (1967).

[19] Decisions such as *United States* v. *Holmes*, 387 F.2d 781 (7th Cir. 1967) and *Pittman* v. *United States*, 411 F.2d 635 (10th Cir. 1969), which hold that there is no requirement that the *Miranda* warning be given at the induction station to a registrant who reports to the induction station but refuses induction are obviously beside the point, and are distinguished by Judge Doyle in *United States* v. *Casias*, 2 SSLR at 3408.

* Attorneys for petitioner gratefully acknowledge the research assistance of Mr. Mark Silverstein, second year student at Columbia Law School, and Mr. Stephen Delbert, third year student at New York University Law School, and express their appreciation to the Law Students Civil Rights Research Council.

Opinion of the United States Court of Appeals, Ninth Circuit

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 25,346

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

PAUL BENNETT BIGMAN,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

Before:

BROWNING, WRIGHT, and TRASK,

Circuit Judges

PER CURIAM:

Appellant was convicted of failing to register with the Selective Service System in violation of 50 U.S.C. App. §462. We affirm.

Appellant contends that the trial court erred in admitting certain statements made by him to FBI agents prior and subsequent to his arrest because the agents did not advise him of his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), before questioning him. The government re-

sponds that appellant was not "in custody" when interviewed prior to his arrest, and had already been adequately warned before the post-arrest questioning. We need not reach these issues. Assuming, arguendo, that appellant should have been advised of his *Miranda* rights on both occasions, he raised no objection on this ground before or during trial and, in fact, expressly declined the trial court's offer to hold a *Jackson* v. *Denno* hearing on the admissibility of the statements. Moreover, the substance of the statements was repeated in appellant's own trial testimony. Under these circumstances, we cannot say that admission of the statements was plain error affecting appellant's substantial rights. Fed. R. Crim. P. 52(b).

Appellant's second contention is that 32 C.F.R. §§1613.11 and 1613.13 required the registrar of the local board to register appellant for the draft on the basis of the information obtained from appellant by the FBI agents. But as we pointed out in *Richter* v. *United States*, 181 F.2d 591, 594 (9th Cir. 1950), these regulations presuppose "that the registrant will present himself for and submit to registration . . . ." In *United States* v. *Norton*, 179 F.2d 527 (2d Cir. 1950), relied upon by appellant here, the registrant "presented himself at the office of the local board on the required date and talked courteously and at length with the chairman." *Id.* at 529.

Appellant also contends that the local board violated the first sentence of 32 C.F.R. §1613.16 by failing to call his attention to the penal provisions of the Selective Service Act. The sentence which appellant isolates must be considered in the context of the balance of section 1613.16 and the provisions of sections 1613.1-1613.14. So read, the warning provision clearly applies only where the person

required to be registered has presented himself for registration at the local board. *Cf. Richter* v. *United States, supra.*

Appellant's two remaining contentions are related. He argues that the Due Process Clause of the Fifth Amendment is violated by limiting the conscientious objector exemption to those who register, and that the compulsory registration procedures of the Act violate appellant's First Amendment right to free exercise of his religious beliefs against compliance with those procedures.

Neither contention is supportable. The "discrimination" between registered and non-registered conscientious objectors is patently not "so unjustifiable as to be violative of due process," *Bolling* v. *Sharpe,* 347 U.S. 497, 499 (1954). Appellant's contention that the registration requirements impinge impermissibly upon constitutionally protected freedom of religion has been rejected in an unbroken line of authority in this circuit (*Richter* v. *United States, supra,* 181 F.2d at 594) and in others. *United States* v. *Toussie,* 410 F.2d 1156, 1161 (2d Cir. 1969); *rev'd on other grounds,* 397 U.S. 112 (1970); *Michener* v. *United States,* 184 F.2d 712, 714 (10th Cir. 1950); *United States* v. *Henderson,* 180 F.2d 711, 713 (7th Cir. 1950); *Gara* v. *United States,* 178 F.2d 38, 40 (6th Cir. 1949); *Warren* v. *United States,* 177 F.2d 596, 599 (10th Cir. 1949). See also *United States* v. *O'Brien,* 391 U.S. 367, 377 (1968).

Affirmed.

Statutes and Regulations

50 App. U.S.C. §453. Registration.

Except as otherwise provided in this title [sections 451, 453, 454, 455, 456 and 458-471 of this Appendix], it shall be the duty of every male citizen of the United States, and every other male person now or hereafter in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder.

50 App. U.S.C. §456.

(j) Nothing contained in this title [sections 451, 453, 454, 455, 456 and 458-471 of this Appendix] shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term "religious training and belief" does not include essentially political, sociological, or philosophical views, or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, [sections 451, 453, 454, 455, 456 and 458-471 of this Appendix], be assigned to noncombatant service as defined by the President, or shall, if

he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) [section 454(b) of this Appendix] such civilian work contributing to the maintenance of the national health, safety, or interest as the local board pursuant to Presidential regulations may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title [section 462 of this Appendix], to have knowingly failed or neglected to perform a duty required of him under this title [sections 451, 453, 454, 455, 456 and 458-471 of this Appendix].

32 C.F.R. 1613.11

Interview of the Registrant.—(a) Every registrant before being registered shall enter his name and place of residence upon one of the numbered lines on the Tally Sheet (SSS Form 4). If the registrant is unable to write, the registrar shall print the registrant's name and place of residence on the Tally Sheet (SSS Form 4). All persons who present themselves for registration shall be registered on a Registration Card (SSS Form 1). All entries on the Registration Card (SSS Form 1) must be made by the registrar and shall be in ink, clear and legible. The registrar shall not permit anyone other than himself to write on the Registration Card (SSS Form 1) except when the registrant signs the completed card.

(b) The space on the Registration Card (SSS Form 1) for the selective service number shall be left blank.

(c) The registrar shall obtain from the registrant and by observation of the registrant the information necessary to complete the entries on the Registration Card (SSS Form 1), and shall enter the information in the proper items of the card. The registrar shall make certain that the registrant fully understands what information is required and if any information given by the registrant is not clear the registrar shall carefully explain to the registrant what information is required and request that it be furnished clearly and correctly.

32 C.F.R. 1613.13

Registrant's Signature.—(a) When the provisions of section 1613.11 and 1613.12 have been carried out, the registrar shall have the registrant verify the correctness of the entries on the Registration Card (SSS Form 1).

(b) The registrant shall then sign his name, exactly as he usually signs it, in the space on the Registration Card (SSS Form 1) provided for his signature. If he cannot sign his name, he shall make his mark, and the registrar shall then write in after the mark the word "The mark of .....
.....,..... made in my presence" and shall sign
(Name of registrant)
his own name thereunder, followed by the word "Registrar."

(c) If the registrant is unable or refuses to sign the Registration Card (SSS Form 1) or to make a mark in lieu of such signature, the registrar shall sign such registrant's name and indicate that he has done so by signing his own name, followed by the word "Registrar" beneath the name of such registrant, and the act of the registrar in so doing shall have the same force and effect as if such

registrant had signed the Registration Card (SSS Form 1), and such registrant shall thereby be registered.

§ 1613.16 Recalcitrants.

If a registrant refuses to cooperate or is inclined to evade, refuses to answer, or answers falsely, his attention should be called to the penal provisions of title I of the Military Selective Service Act of 1967. If he is still refractory, witnesses should be called and, after the penalty of the law has been explained again to him in the presence and hearing of witnesses, a full opportunity should be given him to reconsider his actions and answer the questions. If he is still refractory, his name and the names of the witnesses should be noted and the case immediately reported to the United States district attorney. The registration should not be obstructed or delayed. Persons attempting to obstruct or delay it should be dealt with promptly and firmly.

Selective Service System Form No. 392

(Fold and fasten before mailing)

SELECTIVE SERVICE SYSTEM
OFFICIAL BUSINESS

POSTAGE AND FEES PAID
SELECTIVE SERVICE SYSTEM

(Local Board Stamp)

ADDRESSEE:

(SEE REVERSE SIDE FOR INSTRUCTIONS)

SELECTIVE SERVICE SYSTEM
LOCAL BOARD INQUIRY
(TYPE OR PRINT IN INK)

Form approved
Bureau of the Budget No. 33-R159.4

1. Name ..... 2. Date of birth ..... 3. Telephone No. .....

4. I registered with Local Board No. ..... on ..... at ..... (City, town, or village) ..... (State)
giving my place of residence as ..... (Street and number, city, town, or village) ..... (State) ..... (Zip Code)

5. My Selective Service Number is (If none enter "None")
DO NOT ENTER ARMED FORCES SERVICE NUMBER

6. I have not registered but will register within 5 days at ..... (City, town, or village) ..... (State)

7. I (*check one*) ☐ AM ☐ AM NOT on active duty in the (*check one if applicable*) ☐ ARMY ☐ NAVY ☐ AIR FORCE ☐ MARINE CORPS ☐ COAST GUARD. I entered active duty on ..... (Date) for ..... (Years).

8. ☐ Check here if you are a retired member of a regular component of the Armed Forces.

9. Current mailing address ..... (Number and street or R.F.D. route) ..... (City, town, or village) ..... (State) ..... (Zip Code)

SSS Form No. 392 (Revised 6-28-63)
(Previous printings may be used until exhausted)

..... (Signature) ..... (Date)

8" X 7"

FACE

PA-9

SELECTIVE SERVICE SYSTEM
OFFICIAL BUSINESS

POSTAGE AND FEES PAID
SELECTIVE SERVICE SYSTEM

TO

(Local Board Stamp)

(DETACH BEFORE MAILING)

DEAR SIR: Date .....

According to your date of birth shown in the records of this local board, you should be registered with the Selective Service System. This local board has jurisdiction over the address in the records referred to but you are not recorded as a registrant.

If you have not been registered on or after August 30, 1948, and are a citizen born after August 30, 1922, or an alien born on or after September 15, 1925, you are required to register by reporting in person at the nearest Selective Service Local Board unless you can establish that you are a person not required to register.

If you did not register prior to entering the Armed Forces you must register within 30 days following the date of your release from active duty unless you are a retired member of a regular component of the Army, Navy, Air Force, Marine Corps, Coast Guard, Coast and Geodetic Survey, or the Public Health Service. If you have any doubt about your obligation to register, consult with any selective service local board.

Please complete the items applicable to you on the Local Board Inquiry portion of this card, sign and date in the spaces provided, and detach and mail that portion. All entries, except your signature, should be typed or printed in ink. No postage is required.

.....
(Member or Clerk of Local Board)

REVERSE

PA-10

PROCEDURAL DIRECTIVE

Local Board Inquiry—SSS Form No. 392

1. Purpose:

   To establish contact with persons for whom the local board has received an Armed Forces of the United States Report ~~of Transfer~~ or Discharge (DD Form 214) or other military document, or other information indicating a liability for registration.

2. Preparation:

   Prepared in original only. The local board clerk places the local board stamp in the spaces provided, fastens the edges of the folded form together, and mails it to the addressee, who enters the applicable information, separates the card on the perforated line, and returns the preaddressed portion to the local board.

3. Distribution:

   Mailed to the person at the address of record. The mailing date may be recorded on the DD Form 214 or other document, or in a control record set up by the local board clerk. When returned, and after administrative action has been taken, forms for registrants shall be filed in their cover sheets; forms for nonregistrants in the alphabetic file or nonregistrant DD Forms 214.

   Forms returned by persons indicating they are registered or will register with another local board are forwarded with the DD Form 214 or other document

to the State Director for transmittal to the appropriate local board.

4. DISPOSAL:

SSS Forms Nos. 392 for registrants are filed in their Cover Sheets (SSS Form No. 101). SSS Forms Nos. 392 for nonregistrants are authorized for disposal, donation to a state agency, or destruction by macerating, shredding, or burning after retention for one year, at the discretion of the State Director, in accordance with State Director Advice No. 675.

5. RELATED FORMS:

DD Forms 62, 214 and 215, Standard Form 88, and PHS Form 1867.

6. REFERENCES:

Selective Service Regulations, Part 1611, and State Director Advice No. 675.

LEWIS B. HERSHEY,
Director

FIFTH EDITION
January 15, 1968

Letter of Major Thomas R. Maher Dated June 24, 1970

New York City Headquarters
SELECTIVE SERVICE SYSTEM
Federal Building
26 Federal Plaza
New York, N. Y. 10007

Refer to File
34:bj

June 24, 1970

Karpatkin, Ohrenstein & Karpaatkin
Counselors at Law
1345 Avenue of the Americas
New York, N. Y. 10019

Attention: Marvin M. Karpatkin, Esq.

Dear Sir:

Reference your letter of June 24, 1970. It is the practice of this office, upon receipt of information that a particular person is not registered, to check our master file system to determine whether in fact he is not registered in New York City. If our records reflect that he is not so registered, the SSS Form 392 is issued.

Very often we find that upon receipt of the SSS Form 392, the registrant indicates that he is properly registered outside of New York City, and therefore, no further action is warranted. If no reply is received from our SSS Form 392, or if the reply is negative, we generally report the

matter to the United States Attorney through the Federal Bureau of Investigation for investigation.

If there is any indication from a receipted SSS Form 392, that compliance with our regulations can be had, we would normally attempt to bring about compliance by mailing him a letter advising him to register immediately.

It should be noted that this practice has been developed through the experience of this office, and may not be suitable for other areas.

For the New York City Director

THOMAS R. MAHER
Major, AGC
Chief, Legal Division

Opinion of the Court in *United States* v. *Lindsay*

[Stamp—Filed Jan. 21, 1958—Clerk, U.S. District Court —Southern District of California—by (signature illegible), Deputy Clerk.]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
NORTHERN DIVISION

No. 3496-ND

Order for Judgment

UNITED STATES OF AMERICA,
Plaintiff,

v.

PAUL LA VERN LINDSAY,
Defendant.

The defendant, Paul La Vern Lindsay, by indictment filed in this Court on December 6, 1957, was charged with a violation of the Universal Military Training and Service Act, Title 50 App. U.S.C.A. Section 462, in that he knowingly refused to be inducted into the armed forces of the United States on January 11, 1957 as ordered by the local draft board No. 68 of Fresno, California on December 13, 1956.

Trial was held on January 7, 1958 before the Court sitting without a jury, the defendant having waived his right to trial by jury in writing in open court. The government

was represented by Laughlin E. Waters, United States Attorney, Thomas R. Sheridan, Assistant United States Attorney, appearing. The defendant was represented by J. B. Tietz.

The evidence on behalf of the United States consisted of a certified photostatic copy of the Selective Service record of the defendant on file in the office of local board No. 68 of Fresno, California, which was received in evidence on stipulation of the parties and marked "Plaintiff's Exhibits No. 1 and 1-A."

An examination of Exhibits No. 1 and 1-A reveals the following:

May 19, 1952, defendant registered with Board 68, Fresno, California.

July 8, 1952, defendant sent his Selective Service Classification Questionnaire (SS Form 100) to Board 68, in which he signed Series XIV indicating he had conscientious objection to war.

December 17, 1952, defendant returned to Board 68 a Special Form for Conscientious Objector (SS Form 150) in which he claimed he was conscientiously opposed to participation in war in any form as he is a member of Jehovah's Witnesses.

January 5, 1953, Board 68 by a vote of 4 to 0 classified the defendant 1-O.

January 7, 1953, Board 68 notified the defendant of his 1-O classification.

August 20, 1954, defendant informed Board 68 that he had contracted marriage on June 19, 1954 (Exhibit 1, page 73).

September 29, 1954, Board 68 ordered the defendant to report for his pre-induction physical examination on October 8, 1954 at Fresno, California.

October 8, 1954, defendant took his pre-induction physical examination and was found acceptable.

October 15, 1954, Board 68 notified the defendant (Form DD62) that as a result of his physical examination he was found fully acceptable for induction into the armed services.

October 18, 1954, defendant gave Board 68 a signed statement as follows: "I wish to be re-classified as 1-A acceptable to induction into the Armed Forces."

November 8, 1954, Board 68 by a vote of 3 to 0 classified the defendant 1-A.

November 9, 1954, Board 68 notified the defendant of his 1-A classification.

March 12, 1956, Board 68 by a vote of 3 to 0 placed the defendant in category 1.

November 23, 1956, Board 68 sent the defendant a dependency questionnaire (SS Form 118).

November 25, 1956, defendant completed the dependency questionnaire, in which he stated that no one was dependent upon him for support.

November 27, 1956, defendant sent Board 68 the dependency questionnaire.

December 13, 1956, Board 68 ordered the defendant to report for induction on January 11, 1957 at Fresno, California.

January 11, 1957, defendant reported for induction as ordered, he took the physical examination and was found to be fully acceptable, but when he was asked to take one step forward for induction he refused.

At the conclusion of the plaintiff's case, the defendant moved the Court for a judgment of acquittal based upon the following grounds:

1. There is no evidence to show that the defendant is guilty as charged in the indictment.

2. The local board deprived defendant of his procedural rights to an appearance before Local Board and to an administrative appeal when it failed to formally reclassify him on or after November 25, 1956.

3. The Government has wholly failed to show that defendant refused to submit to induction in that he was not given the opportunities provided by the applicable regulations to go through the mandatory induction prerequisites at the induction station.

It is the defendant's contention under the second ground that Board 68 reopened or should have reopened defendant's case, either on November 23, 1956 when the Board sent the dependency questionnaire to the defendant, or on November 27, 1956, when the completed questionnaire was received by Board 68, and as a result thereof the local board had deprived defendant of his procedural right to an appearance before the local board and to an administrative appeal, when it failed to formally reclassify him.

The regulations governing the reopening of a classification are found in Part 1625.2 and 1625.4 of Title 32, Code of Federal Regulations. These regulations provide:

Part 1625.2. The local board may reopen and consider anew the classification of a registrant (1) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification, or (2) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification. * * *

Part 1625.4. When a registrant, any person who claims to be a dependent of a registrant, any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, or the government appeal agent files with the local board a written request to reopen and consider anew the registrant's classification and the local board is of the opinion that such facts, if true, would not justify a change in such registrant's classification, it shall not reopen the registrant's classification. In such a case, the local board, by letter, shall advise the person filing the request that the information submitted does not warrant the reopening of the registrant's classification and shall place a copy of the letter in the registrant's file.

There was no written or oral request by anyone to reopen the defendant's classification. Even if it be assumed

that the filing of the dependency questionnaire by the defendant could be construed as a written request by defendant to reopen the classification, the questionnaire does not present facts not considered when the defendant was classified on November 8, 1954, because defendant had previously informed the board that he was married. Under Regulation 1622.30 of Title 32 of the Code of Federal Regulations, which deals with dependency deferments, defendant could not qualify for such a deferment inasmuch as he stated in the dependency questionnaire that no one was dependent upon him for support.

The defendant further contends that if Board 68 refused to reopen the classification, the defendant should have been advised of this fact in accordance with Regulation 1625.4. In the light of the facts stated above, it is clear that this regulation is not applicable in the instant case and Board 68 was not required to advise the defendant that it did not reopen his case.

I have reviewed the cases cited by the defendant on the subject of reopening classifications, and none of them support the defendant's contention when viewed in the light of the facts in this case. I am satisfied from the evidence in this case that no prejudice of any kind has resulted to the defendant and that he has not been deprived of his procedural rights insofar as the second ground of the motion for acquittal is concerned. (*Knox* v. *U.S.*, 200 F. 2d 398).

The third ground relied upon by the defendant in support of the motion for judgment of acquittal presents a different question. The Selective Service regulations make no provision for the procedure to be followed in the event the registrant appears for induction but refuses to be inducted. A regulation of the Department of the Army No. 601-270,

paragraph 28, dated April 5, 1956, sets out in detail the required procedure as follows:

"28. Processing registrants in special categories.

a. *Special categories.* This paragraph contains instructions regarding the processing of registrants in the following categories:

(1) Registrants refusing to submit to induction.
(2) * * *
(3) * * *
(4) * * *
(5) * * *

b. *Registrants who refuse to submit to induction.* Any registrant removed from the group as prescribed in paragraph 24b and who persists in his refusal to submit to induction will be informed that such refusal constitutes a felony under the provisions of the Universal Military Training and Service Act, as amended. He will be informed further that conviction of such an offense under civil proceedings will subject him to be punished by imprisonment for not more than 5 years, or a fine of not more than $10,000, or both. He will then be informed again of the imminence of induction using the language specified in paragraph 24a, and his name and service again will be called. If he steps forward at this time, he will be informed that he is a member of the armed service concerned, using the language specified in paragraph 24c. If, however, he persists in refusing to be inducted, the following action will be taken.

(1) The registrant will be requested, but not required, to make a signed statement, dated, in his

own handwriting, as follows: 'I refuse to be inducted into the Armed Services of the United States.' Such statement should be witnessed by at least two witnesses who will affix their signatures to the statement. Registrants who refuse induction will not be furnished any means of transportation.

(2) Letter of notification of refusal to submit to induction will be prepared in quadruplicate. The original, together with the voluntary statement described in (1) above, will be submitted to the United States Attorney for the district in which the registrant refused to be inducted. One copy will be forwarded to the State director, Selective Service System, of the State in which the registrant refused to be inducted; one copy will be forwarded to the Selective Service local board which delivered the registrant for induction; and the other copy will be retained at the induction station. Such notification will include the following information:

(a) Name and address of registrant.

(b) His Selective Service number.

(c) Number and address of the Selective Service local board which delivered the registrant for induction and, if different, the registrant's own Selective Service local board.

(d) A detailed statement of facts concerning the registrant's refusal to be inducted.

(e) Names and addresses of witnesses.

The Selective Service file contains the letter of notification of defendant's refusal to submit to induction as required by Army Regulation No. 601-270. (Plaintiff's Exhibit 1, page 21). This letter reads as follows:

"15 January 1957.

AMRCT-7 201 LINDSAY, Paul La Vern
SSN 4-68-34-251

SUBJECT: Refusal to Submit to Induction.

TO: The United States District Attorney
Federal Building
Spring Street
Los Angeles 12, California

1. In compliance with par. 28b, AR 601-270 dated 5 April 1956, the following information is furnished pertaining to Mr. Paul LaVern Lindsay, a Selective Service Registrant who refused to submit to induction:

a. Paul LaVern Lindsay, 4717 West Hedges, Fresno, California.

b. Selective Service Number: 4 68 34 251

c. Local Board No. 68 (Fresno County) U.S. Post Office Bldg., Fresno, California.

2. The registrant, Paul LaVern Lindsay, was asked to take one step forward for induction but refused to do so. He was then asked to step to one side, and the procedure was explained again. He was informed that refusal constitutes a felony under the provisions of the Selective Service Regulations and that conviction would subject him to punishment. He was again told of the imminence of induction; his name and service were again called but he still refused to step forward.

3. The registrant declined to sign a statement that he refused to be inducted. Procedure was witnessed by the following:

M/Sgt Albert F. Thomas Humas—U.S. Army RMS, Detachment 7 (6400) 1830 "H" Street, Fresno, California.

SFC Harold A. Phillips—U.S. Army RMS, Detachment 7 (6400) 1830 "H" Street, Fresno, California.

FOR THE COMMANDER:

JERRY GREENFIELD
Capt. AGC
Adjutant.

cc furnished
State Dir Sel Ser
Local Board No. 68.

It is to be noted that the letter states that the defendant was informed that refusal "constitutes a felony under the provisions of the Selective Service regulations and that conviction would subject him to punishment." It omits to state that the defendant was informed that the punishment might be "by imprisonment for not more than 5 years or a fine of not more than $10,000 or both." No other evidence appears in the record concerning the circumstances surrounding the defendant's refusal to submit to induction, except said letter.

In *Chernekoff* v. *United States*, 219 F 2d 721 (Ninth Circuit) the court stated at page 725, referring to the Army regulation:

"One purpose of this regulation is self-evident. It is intended to give a registrant a last clear chance to change his mind and accept induction rather than certain indictment and possible conviction for a felony carrying a maximum punishment of five years or a fine of not more than $10,000 or both. The regulation is couched in mandatory, not discretionary, language."

The plaintiff contends that in the absence of evidence to the contrary, it must be presumed that the defendant was advised by the induction officials that the offense of refusing to submit to induction would subject the defendant to punishment by imprisonment for not more than 5 years or a fine of not more than $10,000, or both, because of the presumption that public officials perform their duties according to law. The vice in this argument is that even if the letter (Plaintiff's Exhibit No. 1, page 21) does not overcome the presumption of regularity in showing that the induction officials did not follow the regulation, the letter raises a reasonable doubt that the regulation was followed. This doubt might have been overcome if the government had elected to call as witnesses the induction officials who might have testified that the warning given the defendant included the nature and extent of the possible punishment. The government, however, elected to stand on the Selective Service file. It may well be that if the defendant had been advised of the severity of the punishment that he would have changed his mind. As the Court in the Chernekoff case, at page 725, stated; "It does not matter that he might not have changed his mind. He should have been given the opportunity granted him by the Army's own regulation to seriously reflect and to let actions speak louder than words."

In this case, the defendant is presumed to be innocent until his guilt has been established beyond a reasonable doubt. Under the evidence in this case, and giving to the defendant the presumption of innocence to which he is entitled, I am compelled to state that I have a reasonable doubt that the defendant was given the required warning. The warning given him simply stated that conviction would subject him to punishment. He was entitled to know the severity and extent of the punishment which might have had the effect of causing the defendant to change his mind.

In connection with the third ground of the motion for judgment of acquittal, the defendant contended that the file failed to disclose that he had taken the "loyalty oath." During the course of the trial, the loyalty oath was produced from the induction center, and received in evidence as Plaintiff's Exhibit 1-A. After viewing the oath as signed by the defendant, his counsel abandoned this contention.

The facts and the law in this case require that the motion of the defendant for judgment of acquittal be granted and it is so ordered. Judgment of acquittal of the defendant will be entered and the bond of the defendant exonerated.

The Clerk of this Court is directed to forthwith mail copies of this order to counsel.

DATED: January 17, 1958

GILBERT H. JERTBERG
Judge, United States District Court

Selective Service System Form No. 304

SSLR 6-69

SELECTIVE SERVICE SYSTEM

Approval Not Required

DELINQUENCY NOTICE

(Local Board Stamp)

(Date Declared Delinquent)

(Date of Mailing)

SELECTIVE SERVICE NO.

To _____ (First) (Middle) (Last)

Address _____ (Street and Number, or RFD Route)

(City, Town, or Village) (County) (State) (ZIP Code)

SAMPLE

1. You are hereby notified that this Local Board has declared you to be a delinquent because of your failure to perform the following duty or duties required of you under the selective service law:)

2. You are hereby directed to report to this Local Board immediately in person or by mail, or to take this notice to the Local Board nearest you for advice as to what you should do.

*3. Your willful failure to perform the foregoing duty or duties is a violation of the Universal Military Training and Service Act, as amended, which is punishable by imprisonment for as much as 5 years or a fine of as much as $10,000, or by both such fine and imprisonment. You may be classified in class 1-A as a delinquent and ordered to report for induction.

_____
(Member or Clerk of Local Board)

INSTRUCTIONS

A Delinquency Notice (SSS Form 304) shall be prepared by the Local Board whenever it declares the registrant to be a delinquent because of his failure to perform any duty or duties required of him other than failure to comply with an Order to Report for Induction (SSS Form 252), or an Order to Report for Civilian Work and Statement of Employer (SSS Form 153). This notice shall be prepared in triplicate, and the specific duty or duties which the registrant has failed to perform shall be described in detail in the space provided. The Local Board shall: (a) mail the original to the registrant at his last known address, (b) file a copy in the registrant's Cover Sheet (SSS Form 101), and (c) mail a copy to the State Director of Selective Service.

21-50-25

SSS Form 304 (5-25-65)

3. EFFORTS MADE TO LOCATE DELINQUENT:

The delinquent _____ been located on _____ at _____
(Has, has not) (Date) (Address)

The person who will always know the delinquent's address is _____
(Name)

_____ (Address). This person _____ been contacted
(Has, has not)

_____ on _____ with the following result _____
(Letter, telephone, in person) (Date)

_____

The delinquent's last known place of employment or business is _____
(Name),

_____ (Address); _____ (Telephone number). His employer _____ been contacted
(Has, has not)

_____ on _____ with the following result _____
(Letter, telephone, in person) (Date)

_____

4. Mail directed to the delinquent _____ returned by the post office.
(Is, is not)

5. REMARKS: (Include additional efforts to locate delinquent or names of individuals who may know whe
abouts of the delinquent.)

6. FUTURE INFORMATION:

You will be advised promptly by letter of any change in this delinquent's status and of any additional fa
which may come to the attention of this board concerning his whereabouts or which may aid you in apprehe
ing and prosecuting him.

_____
(Member, Executive Secretary or Clerk of Local Board)

This form shall be used to report to the United States Attorney those delinquents who fail to report for induction or who fail o
refuse to submit to induction. Other delinquences, if reported to the United States Attorney, shall be reported by letter.

This form shall be made out in quadruplicate. The original and two copies are forwarded to the State Director of Selective
Service, who shall transmit the original and one copy to the United States Attorney for the judicial district in which the local bo
is located and retain one copy. One copy of the form shall be filed in the Cover Sheet (SSS Form 101) of the delinquent.

GPO 871-88